No. 87-1167

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PRICE WATERHOUSE,

Petitioner,

vs.

ANN B. HOPKINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE COMMITTEES ON CIVIL RIGHTS, LABOR AND EMPLOYMENT LAW, AND SEX AND LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, ANN B. HOPKINS

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The Committees on Civil Rights, Labor and Employment Law, and Sex and Law of The Association of the Bar of the City of New York (the "Association"), with the consent of counsel to both parties, respectfully submit this brief on behalf of the Association as *amicus curiae* in support of respondent.

INTEREST OF AMICUS

The Association is an organization of about 18,000 lawyers practicing or residing principally in the New York City metropolitan area. Any member of the legal profession may apply for membership in the Association.

The Association is committed to the principle of equal opportunity for all in the workplace, regardless of race, religion, sex or other group affiliation. The Association is particularly committed to eliminating invidious discrimination in the legal profession.

From 1870, when the Association was formed, until 1937, women were not admitted to membership. Today, 18% of the Association's members are women, and many of them are actively involved in the Association's work. The Executive Secretary of the Association and several members of the Association's Executive Committee, including its Chair, are women. Women sit on every one of the Association's 133 standing and special Committees and head more than twenty of those committees. In light of its history, purpose and membership, the Association is in a unique position to comment on the existence of discrimination within the legal profession, its adverse effects and the importance of its elimination.

Although sex discrimination in the professions undeniably has been reduced in recent years, the Association is concerned that subtle barriers continue to prevent women from advancing to their fullest potential. Since 1869, when Belle Babb Mansfield in Mt. Pleasant, Iowa, became the first woman to be admitted to a state bar in the United States, women have made great strides forward in their search for equality. Yet studies show that women continue to lag behind men, particularly at the highest levels of the professions.

The Association has a strong interest in ensuring that Title VII is implemented to its fullest extent to eliminate illegal barriers to employment and advancement in the professions. Because discrimination in the professions tends to be subtle, the Association believes that evidence of sex stereotyping can and will be the foundation of a Title VII claim in many cases. In this case, both the district court and the court of appeals found that sex stereotyping tainted the decision-making process with regard to respondent. Thus, the Association believes that the decision of the court of appeals should be affirmed.

SUMMARY OF ARGUMENT

Title VII prohibits the erection of barriers to employment on the basis of discrimination because of an employee's race, sex, religion or national origin. Limitations on employment opportunities because of such classifications have been described as:

> "one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies or chooses."

Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970); *accord Rowe v. General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972). Such limitations not only defy current standards of decency, they prevent the full utilization of human potential in the workplace.

Sex stereotyping -- that is, the expectation that an individual will or should behave in a particular way because

of his or her gender -- permeates society. Sex stereotypes undoubtedly underlie certain types of employment decisions, particularly those that are made on subjective bases. Advancement in the professions is especially susceptible to taint from discrimination rooted in stereotyped expectations, because election to partnership, tenure or their equivalent is frequently the result of evaluating subjective criteria in a consensus rather than majority rule setting. Because claims of such discrimination can be difficult to prove, it is imperative that this Court make clear that Title VII is offended if an employment decision is tainted by sex-role expectations.

The record in this case amply supports the district court's conclusion that respondent was the victim of intentional sex discrimination. At a minimum, Ms. Hopkins established that Price Waterhouse's initial decision to deny her partnership was tainted by evaluations infected by sex stereotyped expectations. Moreover, respondent's mentor, who was entrusted with the task of explaining to her why she was not made a partner in 1982, advised her that she could succeed if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled and wear jewelry" -- i.e., if she would behave more like some of the men of Price Waterhouse thought a woman should behave.

ARGUMENT

I. Sex Stereotyping Affects Employment Decisions in the Professions.

Abundant social science research indicates that sex stereotyping -- expectations of how men and women should and do act -- affects thinking across a surprisingly vast demographic cross-section of American society. *See generally*

J. Chafetz, *Masculine/Feminine or Human? An Overview of The Sociology of Sex Roles* (1974); L. Duberman, *Gender and Sex in Society* (1975); Bem, *The Measurement of Psychological Androgyny*, 42 J. Consulting & Clinical Psychology 155, 157 (1974); Coser & Rokoff, *Women in the Occupational World: Social Disruption and Conflict*, 18 Soc. Probs. 535, 540 (1971). 1/ According to these stereotypes, men should be aggressive, independent, and capable; women should be soft, sensitive and subservient. These perceptions are rooted in centuries of western thought about the roles of men and women. Although expectations of the woman's role are often engendered by paternalism, and therefore may be perceived to be benign, they nonetheless have the effect of preventing women from sharing fully in all levels of society. Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*, 21 B.C.L. Rev. 345, 349-50 (1980).

With regard to sex stereotyping, certain behavior may be acceptable if exhibited by those of one gender, but not by those of the other. For example, a woman who behaves "like a man" -- aggressively and independently -- will frequently be judged to be unpleasant or "bitchy." The more "counter-stereotypic" she is -- i.e., the more aggressive and independent -- the more disproportionately negative the reactions to her will be. *Id.* at 395-96. Yet the same behavior in a man will be perceived as appropriate and, thus, not unpleasant.

1/ Even women themselves tend to attribute particular behavior and attributes to other women. *See* Goldberg, *Are Women Prejudiced Against Women?*, 5 Trans-Action, Apr. 1968, at 28.

Sex-role expectations have a tremendous impact on the work place. Occupations that require assertive, intellectual, energetic behavior are thought to be "masculine," while service occupations are thought to be "feminine." When women pursue "masculine" occupations, they tend to be judged more harshly than men. Nieva & Gutek, *Sex Effects on Evaluation*, 5 Academy of Management Review 267, 271-73 (1980); Rosen & Jerdee, *Effect of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. of Applied Psychology 511 (1974). One study, for example, found that people rated the same essay higher if told it was written by a man than if told it was written by a woman, when the essay involved politics, a "male" subject. Paludi & Strayer, *What's in an Author's Name? Differential Evaluations of Performance as a Function of Author's Name*, 12 Sex Roles 353 (1985). In addition, women striving for success in some "masculine" fields are confronted with a Catch-22: Women whose behavior conforms to the requirements of the "masculine" jobs are deemed "unfeminine," and therefore inappropriate for advancement. But women whose behavior conforms more closely to the feminine stereotype may be perceived as not assertive enough for the "masculine" job. As a result, women not only are underrepresented in male-dominated occupations, they are channeled into the less lucrative, less responsible, less prestigious jobs within the occupations. Epstein, *Encountering the Male Establishment: Sex Status Limits on Women's Careers in the Professions*, 75 Am. J. of Sociology 965, 974 (1970). And this occurs, not on the basis of an accurate assessment of an individual's merits, but on the basis of some preconceived notion of how a person ought to behave based on his or her sex.

Times have clearly changed since three Justices of the Highest Court wrote that "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother." *Bradwell v. Illinois*, 16 Wall. 130, 21 L.Ed. 442 (1873) (Bradley, J., concurring). The experience of the legal profession is illustrative. Although only 6% of the lawyers were women in 1968, women now comprise 20% of those who are lawyers. A.B.A. Journal, June 1, 1988, at 6. Further, 41.5% of the students in law school are women. *Id.* at 50.

But while women have made great strides toward acceptance in the legal profession since the days when they were denied membership in the bar, *Bradwell v. Illinois, supra*, enrollment at law schools, 2/ or employment with law firms, 3/ disparities between the opportunities for female and male lawyers within the legal profession persist. For example, only 8% of partners at large law firms are women, and that figure has risen only 1% since 1982. A.B.A. Journal, June 1, 1988 at 70. Moreover, women who are lawyers tend to earn less than male lawyers, even within subgroups. The median income of women associates is 83% that of men associates; of women partners is 68% of men partners; and of women solo practitioners is 53% of men solo practitioners. *Id.* at 72.

2/ Washington & Lee Law School denied women admittance until 1972. *Trial*, August 8, 1983, at 84.

3/ It is estimated that as of 1968, only 40 women had worked for Wall Street law firms. C. F. Epstein, *Women in Law* 176 (1981).

Women law professors similarly are disproportionately represented, particularly at the tenure level, and particularly at the more prestigious law schools. 4/ *Id.* at 53.

Mistaken attitudes about women as lawyers also permeate the profession. While overt sex discrimination is now rare, women are subjected to a subtler form of discrimination. In its report to the Chief Judge of the State of New York, The New York Task Force on Women in the Courts found that female lawyers are often treated in an unprofessional manner. *The Report of the New York Task Force on Women in the Courts* (1986).

Of particular importance for this case, the Report found that, whereas aggressive behavior by male attorneys was rewarded or tolerated, it was viewed as inappropriate from female attorneys. *Id.* at 230–32. One woman who was surveyed wrote:

> "[I]f a male attorney objects repeatedly during trial he is 'going all out for his client' and is 'a real fighter.' If a female attorney objects similarly, she is a 'bitch' or a 'tough broad.' Do you know one attorney actually came over and tried to kiss me to seal his victory after a hard fought trial?"

Another stated:

> "Judges, counsel and court personnel will act more favorable towards women who fit their perceptions of a 'good' woman, good meaning one who acts 'appropriately,' e.g., feminine, helpless, who defer to the 'better judgment' of men."

Confirming these impressions, a survey reported in the American Bar Association Journal showed that male lawyers perceived that the greatest weakness of female lawyers was that they were "too emotional and *abrasive*." 69 A.B.A. Journal 1383, 1384 (Oct. 1983) (emphasis added).

Inappropriate treatment of women not only offends general notions of dignity and decency, it can also impede the effectiveness of a female attorney advancing her case. It can damage not only the confidence of the attorney, but the confidence of the client in the attorney's abilities as well. *The Report of the New York Task Force on Women in the Courts, supra* p. 8, at 211–12. Inappropriate treatment perpetuates inaccurate perceptions of women, and thereby prevents society from drawing fully on all of its resources.

Advancement to partnership in the professions is particularly susceptible to taint from discriminatory stereotyping, for a number of reasons. First, partnership decisions often involve subjective criteria. Successful professionals possess attributes -- like creativity, energy, ambition, confidence, personability and facility with language -- that are particularly difficult to measure and balance. Moreover, distinguishing between good and superior performance, as is required for advancement decisions about professionals, requires the exercise of subtle judgment by the decisionmakers. Epstein, *supra* p. 6, at 971.

While reliance on subjective criteria within an undefined framework often is necessary for decisions concerning advancement in the professions, and as such is neither improper nor illegal *per se*, *see, e.g.*, *Rogers v. International Paper*

4/ During the 1986–87 academic year, five of the 56 tenured positions at Harvard were filled by women; none of the 22 at the University of Chicago, one of the 39 at the University of Michigan, and two of the 36 at Stanford. A.B.A. Journal, June 1, 1988, at 53.

Co., 510 F.2d 1340, 1345 (8th Cir.), *vacated and remanded on other grounds*, 423 U.S. 809 (1975), such reliance poses a danger: subjective criteria are more easily infected by stereotyping than objective criteria. *Id.* Decisionmakers may unlawfully give greater effect to sex-role expectations if they are judging a candidate's personality or general performance than measuring her upper body strength or calculating her score on a civil service test.

In addition, any underlying stereotyping typically goes unstated. Thus even if the ultimate decisionmaker -- or in a partnership, most of the decisionmakers -- is committed to equal opportunity, a tainted evaluation may evade detection and taint the process. Newman, *Remedies for Discrimination in Supervisorial and Managerial Jobs*, 13 Harv. C.R. - C.L. L. Rev. 631, 644 (1978).

Further, partnerships (the form of organization adopted by most professional firms) are operated on a collegial basis, so that partners often search for a consensus, rather than commit themselves to governance by majority rule. Such a system empowers a small number of partners to veto a candidate's application, which increases the likelihood that discrimination will taint a partnership decision.

Finally, interaction in partnerships, particularly at the upper level, is often characterized by a "club-like" atmosphere. To maintain this atmosphere, some decisionmakers may choose to select "one of their own," and thereby exclude minorities and women from joining their ranks. Epstein, *supra* p. 6, at 968. As a result of the manner in which partnership decisions are reached, successful Title VII claims involving the professions may depend largely on evidence of subtle discrimination, including stereotyping.

Other factors make claims of discrimination in the professions harder to prove than claims involving lower level jobs. Because those with greater education and worldliness are more knowledgeable about the illegality of sex discrimination, they are less likely to make express sexist comments or provide other direct evidence of discriminatory intent. In addition, fewer people typically are considered for partnership than are considered for advancement in lower level jobs. As a result, the pool of comparison is smaller, making a claim of discrimination harder to prove. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 998 (1982). This problem is exacerbated by the fact that women and minorities generally have not competed for professional jobs until recently, so that an historical framework is of relatively minor probative value. In light of these limitations, reliance on evidence of decisionmaking tainted by sex-role expectations is often critical to establishing a violation of Title VII.

II. A Violation of Title VII Occurs if An Employment Decision is Tainted by Evaluations Incorporating Disappointed Sex-Role Assumptions.

Title VII prohibits limitations on employment on the basis of sex. The purpose of Title VII is to eliminate discriminatory barriers to employment, and thereby to ensure equal opportunity of employment for all, regardless of group affiliation. 5/ Title VII does not accord greater rights to women and minorities; it simply ensures that they are judged, as individuals, by the same criteria as others are judged.

5/ *See* H.R. Rep. No. 914, 88th Cong., 1st Sess. 24 (1963), (Continued)

Although more Title VII claims have been asserted by lower level workers, white collar workers and professionals are also covered by the Act. In 1972, Congress amended Title VII to cover university faculty positions and federal government positions. 6/ At the same time, Congress rejected a proposal to exempt physicians from those protected under the statute. 7/ More recently, this Court held that if parties agree to have a lawyer-employee considered for partnership in a law firm, that agreement is a "term, condition, or privilege" of employment covered by Title VII. *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

As noted above, sex discrimination in the professions tends to take the form not of blatant sexism, but rather of subtle sex-role expectations. This Court, having identified

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reprinted in 1964 U.S. Code Cong. & Ad. News 2391, 2401; *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 n.28 (1976).

6/ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103-04 (codified at 42 U.S.C. § 2000e-1 (1976)).

7/ Sen. Javits stated, in opposition to the proposal:

> "One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; that only the blue-collar jobs and ditchdigging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.
>
> ....
>
> Yet, this amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion -- just

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a right under Title VII to equal opportunity for professional advancement, is now confronted with determining the most effective means of ensuring that the right is protected.

This Court has recognized that, in passing Title VII, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978); *see also County of Washington v. Gunther*, 452 U.S. 161, 180 (1981). The *Gunther* Court noted, "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." 452 U.S. at 178 (citing S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964)). Judging a person more harshly or negatively because she does not behave in a typically feminine way -- that is, because of a stereotype -- is discrimination violative of Title VII. The expectation is inappropriate because it arises by reference to the employee's group affiliation, not by reference to the employee's individual attributes.

Although the district court and the dissenting judge of the court of appeals suggested that this case involves a newform of discrimination, that is definitely not the case. An employment decision using evaluations founded on sex-role

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> confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain -- and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect of it, and the Federal law will not protect them."

118 Cong. Rec. 3802 (1972).

expectations is discrimination with which the courts long have been familiar. This Court has recognized that "[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals" and therefore violate Title VII. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). In *Dothard v. Rawlinson*, 433 U.S. 321, 333–34 & n.17 (1977), the Court noted that the bona fide occupational qualification exception does not apply if the refusal to employ is based on stereotypic assumptions.

Federal courts routinely reject job limitations on the basis of stereotyped expectations. *See, e.g., Fadhl v. City and County of San Francisco*, 741 F.2d 1163 (9th Cir. 1984) (liability may be established where treatment of police officer trainee was the result of bias against women, as evidenced by such comments as "[she is] too much like a woman," and "[she is] very ladylike at all times, which in the future may cause problems"). A woman must be given the opportunity to show she is strong enough to perform a particular job, rather than be denied the job outright on the assumption that most women would be too weak. *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *see also Vant Hul v. City of Dell Rapids*, 462 F. Supp. 828 (D.S.D. 1978) (defendant's preference for a "big man [who] could handle things" represented sex stereotyping illegal under Title VII). Rather than being rejected for a position, a woman must herself be free to decide whether a job is too dangerous. *Weeks v. Southern Bell Tel. and Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969). A woman must be trusted to choose her own "business clothes," and may not be relegated to wearing a uniform when men in comparable positions may wear business suits. *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1033 (7th Cir. 1979),

cert. denied, 445 U.S. 929 (1980). A woman must be permitted to continue her employment as a flight attendant upon becoming a mother if men attendants are permitted to continue their employment upon becoming fathers. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1147 (7th Cir. 1978) ("[A]ssumptions steeped in cultural stereotypes, such as that female parents have a more intense concern for their children than male parents . . . are inconsistent with the purposes of the Act."), *reversed on other grounds sub nom. Zipes v. Trans World Airlines*, 455 U.S. 385 (1982).

Job limitations on the basis of racial stereotypes are also illegal. Title VII is implicated where an interviewer has "a tendency to equate pleasant personality characteristics, and particularly an ability to work well with others, with white people." *Robbins v. White-Wilson Medical Clinic*, 660 F.2d 1064, 1068 (5th Cir. 1981), *vacated and remanded on other grounds*, 456 U.S. 969 (1982). In another instance, a court found that blacks who did not conform to the expectations of their white supervisors were criticized for being too aggressive and too abrasive. *Segar v. Civiletti*, 508 F. Supp. 690, 706 (D.D.C. 1981), *modified on other grounds sub nom. Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

Perhaps the best example of how employment decisions based on disappointed stereotyped expectations constitute discrimination is the case of the "uppity black." Certainly, one who fires a black because he fails to act in a subservient manner would be said to violate Title VII. *See* 1968–1973 EEOC Dec. No. 70–198 (CCH) ¶ 6087 (1969). Like the black who does not "shuffle," the woman who does not act softly and demurely is protected from limitations on

her employment because of her counter-stereotypic behavior. *See Vuyanich v. Republic Nat'l Bank of Dallas*, 409 F. Supp. 1083, 1089 (N.D. Tex. 1976) (plaintiff dismissed from job states a claim of sex and race discrimination under Title VII where supervisor "told her that she probably did not need a job anyway, because her husband was a Caucasian").

The Equal Employment Opportunity Commission ("EEOC") has concluded that sex stereotyping is illegal under Title VII. [8/] Thus, the EEOC prohibits employment limitations on the ground that a woman but not a man is married, or on the assumption that the turnover rate is higher among women then men. 29 C.F.R. §§ 1604.2(a)(1)(i); 1604.4. Moreover, the EEOC guidelines expressly state that a bona fide occupational qualification may not be based on:

> "[t]he refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment: that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."

29 C.F.R. § 1604.2(a)(1)(ii).

Thus, denying an applicant a job on the basis of an unsatisfied sex-role expectation, or denying a candidate partnership on the basis of an unsatisfied sex-role expectation, is denying a candidate advancement because of her sex in violation of Title VII. [9/]

[8/] This Court, of course, looks to the guidelines of the EEOC for guidance in interpreting Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

III. Evidence of Decisionmaking on the Basis of Disappointed Sex-Role Expectations Established a Violation of Title VII in this Case.

When the evaluation of a woman's behavior is tainted by considerations of how a woman "ought" to behave, she is not being judged on the basis of her individual abilities and has therefore been subjected to discrimination violative of Title VII. The record in this case clearly supports the trial court's finding that the decision of Price Waterhouse to put respondent on the "hold" list in 1982, rather than make her a partner, was discriminatory.

The parties agree that respondent established a prima facie case of sex discrimination. She was manifestly qualified for partnership. Not only was her work of the highest calibre, but she brought more business to the firm than any of the eighty-seven men considered for partnership in her year. Price Waterhouse then articulated its reason for denying Ms. Hopkins' partnership -- she was deemed too aggressive

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[9/] In cases brought under the equal protection clause, this Court likewise has recognized that differential treatment based on role-typing is prohibited. Social welfare programs that are based on the assumption that men and not women are breadwinners are invalid. *Califano v. Westcott*, 443 U.S. 76 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977). Domestic relations legislation embodying the stereotyped expectation that women remain at home has also been struck down. *Orr v. Orr*, 440 U.S. 268 (1979). Similarly, legislation based on the belief that females are more mature than males between the ages of 18 and 21 has been held to violate the equal protection clause. *Stanton v. Stanton*, 421 U.S. 7 (1975).

and too abrasive for elevation. Ample evidence supports the conclusion that these personality traits were viewed negatively because they did not conform to the stereotype of "proper" female behavior.

Respondent presented evidence that her evaluations were colored by comments about her counter-stereotypical behavior. One critic wrote that Ms. Hopkins would benefit from a "course at charm school." A supporter suggested that Ms. Hopkins came across initially as "macho," but "if you get around the personality thing, she's at the top of the list or way above average." In response to the Admissions Committee's investigating Ms. Hopkins' use of profanity, which was regarded by "several . . . partners" as "one of the negatives," a supporter rejoined that such concerns arose only "because she is a lady using foul language."

That these comments are based on sex generalizations seems obvious. Nonetheless, Ms. Hopkins offered the testimony of Dr. Susan Fiske, a social psychologist, to confirm that sexism underlay some of the evaluations. For example, Dr. Fiske noted that the same assertive behavior by Ms. Hopkins was interpreted in a positive way by some evaluators, and in a negative way by others. Moreover, those that evaluated Ms. Hopkins negatively were vehemently negative. Such a strong negative reaction, according to Dr. Fiske, is an indication of a disappointed sex-role expectation. Many of the studies cited at pp. 5-6, *supra*, support Dr. Fiske's testimony.

Petitioner asserts that the evidence presented by Ms. Hopkins fails to establish a causal relationship between the sexist comments and the decision. It suggests, first, that the evidence fails to establish that the process was tainted, in

that the comments do not reflect the views of the ultimate decisionmakers. Such a view disregards the mechanism of the decisionmaking process -- the Price Waterhouse Policy Board relied on the evaluations of the partners who commented about Ms. Hopkins in rendering its decision.

Further, petitioner asserts that evidence of remarks by supporters is irrelevant to the trial court's inquiry. But the fact that in some instances it was supporters who couched their evaluations in terms of Ms. Hopkins' sex does not render the evidence immaterial. Whether made by a supporter or a detractor, the comments made about Ms. Hopkins illustrate an orientation of sex-role generalizations within the workplace. That is shown by the fact that one of the supporters used sex-based language to explain the negative reaction of some of Ms. Hopkins' detractors to her use of profanity. In addition, while one evaluator may have decided that Ms. Hopkins' advantages outweighed a "macho" personality, his notation of the "macho" personality enabled another decisionmaker to balance that factor differently.

Petitioner also trivializes direct evidence that the Policy Board's conclusion was substantially influenced by sex stereotyping. In deciding to put Ms. Hopkins' name on the "hold" list, the Policy Board noted that, although she had "a lot of talent," she needed "social grace." And Thomas Beyer, who was found by the district court to have been entrusted with explaining the Policy Board's decision to Ms. Hopkins, advised her "to walk more femininely, talk more femininely, dress more femininely, wear make up, have her hair styled, and wear jewelry," if she hoped to become a partner the following year. It is hard to imagine stronger evidence that the decision to deny respondent an otherwise deserved partner-

ship was tainted by impermissible expectations on the basis of sex. 10/

The record also reflects that Price Waterhouse's decisionmaking process was susceptible of discriminatory taint, 11/ and that such taint in fact infected the process as applied to Ms. Hopkins. The Price Waterhouse procedures relied heavily on written evaluations of subjective criteria, unguided by any standards. As discussed above, such a system risks taint from discriminatory decisionmaking. Further, the firm's procedure gave powerful effect to short-form evaluations submitted by partners who had limited contact with a candidate, and hence less opportunity for her to counter the negative reaction engendered by disappointed sex-role expectations by force of her performance. Because Price Waterhouse, like many firms, operated by consensus, this type of form would increase the danger that tainted evaluations would prevent certain candidates from being advanced to partnership. Moreover, the difficulty of ensuring equal opportunity

10/ Petitioner's suggestion that Beyer's comments were simply his own well-intentioned ideas about how respondent could succeed the following year, rather than evidence of what factors underlay the decision (Pet. Br. at 15, n.3), is, ironically, further evidence that sex stereotyping still persists at Price Waterhouse. It reflects the well-documented phenomenon that stereotyping is rooted in paternalism and hence is perceived as benign. (*See supra*, p. 5.)

11/ Because the parties will familiarize the Court fully with the Price Waterhouse procedures, the Association will dispense with a description here, and will proceed to a discussion of its relevant features.

for women is increased where men evaluate women in a traditionally male profession and a male working environment. 12/

This record amply supports the conclusion that the denial of partnership to Ms. Hopkins was impermissibly infected by sex stereotyping. Petitioner's brief, raising novel issues of law, is simply camouflage to confuse a rather straightforward claim. By concerning itself with mixed motive analysis, petitioner sidesteps the abundant evidence demonstrating that the decisionmaking process with regard to Ms. Hopkins was impermissibly tainted by disappointed sex-role expectations.

CONCLUSION

For the reasons stated above, the Association, through its Committees on Civil Rights, Labor and Employment Law, and Sex and Law, urges this Court to affirm the decision of the Court of Appeals for the District of Columbia Circuit.

12/ At trial, Ms. Hopkins presented testimony from Dr. Fiske to demonstrate the risks of taint within the Price Waterhouse decisionmaking process. While the social psychologist did not add to the foundation of the plaintiff's case, she helped interpret it. She pointed out, for example, that short forms exacerbated underlying sex sterotyping, and that where men evaluated women for a "male" job, tainting is more likely to occur.

Respectfully submitted,

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